

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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CURTIS FREENEY,

Plaintiff,

v.

CLEAR RECON CORP, ONEWEST BANK
FSB, and FINANCIAL FREEDOM, a
division of ONEWEST BANK,

Defendants.

Case No. 2:13-cv-02054-MMD-NJK

ORDER

(Plf.'s Motion to Remand – dkt. no. 6)

I. SUMMARY

Before the Court is Plaintiff Curtis Freeney's Motion to Remand (dkt. no. 6). The Court has also considered Defendant Clear Recon Corp. ("CRC") and OneWest Bank, FSB's ("OneWest")¹ Opposition (dkt. no. 12) and Plaintiff's Reply (dkt. no. 15). For the reasons stated below, the Motion is denied.

II. BACKGROUND

The following facts are alleged by Plaintiff in his Amended Complaint. (Dkt. no. 4.) Plaintiff's parents, Attea Freeney and Rubina Freeney ("the Freeneys"), owned the real property located at 2730 Parsons Run Court ("the Property") in Clark County, Nevada. In

¹OneWest explains that while "Financial Freedom, a Division of OneWest Bank" was named in the Complaint, Financial Freedom is a fictitious business name of Defendant OneWest and not an independent entity. (See dkt. no. 12 at 1 n.1.) The Opposition, therefore, is on behalf of all Defendants.

1 1999, the Freeney's recorded a deed of trust in Clark County transferring the Property to
2 the Rubina A. Freeney and Attea C. Freeney Family Trust ("the Trust"). Plaintiff is
3 serving as Trustee of the Trust.

4 Mrs. Freeney's medical records from 2007 and 2008 indicate that she was
5 suffering from dementia. In April or May 2008, when Mrs. Freeney was suffering from
6 dementia and the Freeney's were both eighty-one years of age, the Freeney's entered
7 into a reverse mortgage with OneWest. Later that year, a doctor determined that Mr.
8 Freeney was also suffering from a number of debilitating diseases and Plaintiff became
9 the guardian to both Mrs. and Mr. Freeney. Mrs. Freeney died in 2010 and Mr. Freeney
10 died in 2012.

11 On August 2, 2013, Defendants recorded a Notice of Default and Election to Sell
12 Under Home Equity Conversion Deed of Trust or Reverse Mortgage ("Notice of
13 Default"). The Notice of Default listed CRC as trustee and OneWest as note holder and
14 beneficiary.

15 On October 2, 2013, Plaintiff sued Defendants in the Eighth Judicial District Court
16 of the State Of Nevada ("State Court") alleging five causes of action: (1) rescission;
17 (2) injunctive relief; (3) declaratory relief; (4) deceptive trade practices; and (5) punitive
18 damages. Defendant OneWest removed the case on November 6, 2013, based on
19 diversity jurisdiction. (Dkt. no. 1.) Plaintiff filed a Petition for Remand on November 26,
20 2013. (Dkt. no. 6.)

21 Prior to removal, Plaintiff also moved for a preliminary injunction to enjoin
22 Defendants from foreclosing on the Property. (Dkt. no. 1-3.) The parties have
23 subsequently stipulated to, and the Court has ordered, that the Motion for Preliminary
24 Injunction be denied without prejudice as Defendants have not currently noticed a sale of
25 the Property, but that Plaintiff may re-notice the Motion for Preliminary Injunction should
26 Defendants re-notice the sale. (Dkt. no. 14.)

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1 **III. DISCUSSION**

2 **A. Legal Standard**

3 Federal courts are courts of limited jurisdiction, having subject-matter jurisdiction
4 only over matters authorized by the Constitution and Congress. U.S. Const. art. III, § 2,
5 cl. 1; e.g., *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A suit
6 filed in state court may be removed to federal court if the federal court would have had
7 original jurisdiction over the suit. 28 U.S.C. § 1441(a). However, courts strictly construe
8 the removal statute against removal jurisdiction, and “[f]ederal jurisdiction *must* be
9 rejected if there is any doubt as to the right of removal in the first instance.” *Gaus v.*
10 *Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (emphasis added). The party seeking
11 removal bears the burden of establishing federal jurisdiction. *Durham v. Lockheed Martin*
12 *Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006).

13 To establish subject matter jurisdiction pursuant to diversity of citizenship, the
14 party asserting jurisdiction must show: (1) complete diversity of citizenship among
15 opposing parties and (2) an amount in controversy exceeding \$75,000. 28 U.S.C.
16 § 1332(a). Where a defendant removes a plaintiff’s state action on the basis of diversity
17 jurisdiction, the defendant must either: (1) demonstrate that it is facially evident from the
18 plaintiff’s complaint that the plaintiff seeks in excess of \$75,000, or (2) prove, by a
19 preponderance of the evidence, that the amount in controversy meets the jurisdictional
20 limit. *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115 (9th Cir. 2004). In considering what
21 evidence may be considered under (2) above, the Ninth Circuit has adopted the
22 “practice of considering facts presented in the removal petition as well as any ‘summary-
23 judgment[sic]-type evidence relevant to the amount in controversy at the time of
24 removal.’” *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir.
25 2003) (quoting *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir.
26 1997)).

27 Although an action may be removed to federal court only where there is complete
28 diversity of citizenship, “one exception to the requirement for complete diversity is where

1 a non-diverse defendant has been ‘fraudulently joined.’” *Morris v. Princess Cruises, Inc.*,
2 236 F.3d 1061, 1067 (9th Cir.2001). Joinder is fraudulent “[i]f the plaintiff fails to state a
3 cause of action against a resident defendant, and the failure is obvious according to the
4 settled rules of the state.” *Hamilton Materials, Inc. v. Dow Chemical Corp.*, 494 F.3d
5 1203, 1206 (9th Cir. 2007) (quoting *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339
6 (9th Cir.1987)). In such a case, the district court may ignore the presence of that
7 defendant for the purpose of establishing diversity. *Morris*, 236 F.3d at 1067.

8 “The defendant seeking removal is entitled to present the facts showing the
9 joinder to be fraudulent.” *McCabe*, 811 F.2d at 1339. However, the party asserting
10 fraudulent joinder carries a “heavy burden” of persuasion. *Hunter v. Philip Morris USA*,
11 582 F.3d 1039, 1046 (9th Cir. 2009). Courts must resolve all factual and legal
12 ambiguities in favor of the plaintiff and “[t]he defendant must demonstrate that there is *no*
13 *possibility* that the plaintiff will be able to establish a cause of action in state court
14 against the alleged sham defendant.” *King v. Warner-Lambert Co.*, 2002 WL 988167 (D.
15 Nev. May 7, 2002) (citing *Alexander v. Elec. Data Sys. Co.*, 13 F.3d 940, 949 (6th Cir.
16 1994)); *Good v. Prudential Ins. Co. of Am.*, 5 F. Supp. 2d 804, 807 (N.D. Cal. 1998).

17 A properly pled complaint must provide “a short and plain statement of the claim
18 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v.*
19 *Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual
20 allegations, it demands “more than labels and conclusions” or a “formulaic recitation of
21 the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
22 *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A complaint must contain either direct or
23 inferential allegations concerning “all the material elements necessary to sustain
24 recovery under *some* viable legal theory.” *Twombly*, 550 U.S. at 562 (quoting *Car*
25 *Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1989) (emphasis in
26 original)). “Factual allegations must be enough to rise above the speculative level.”
27 *Twombly*, 550 U.S. at 555. Thus, a complaint must contain sufficient factual matter to

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1 “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (internal
2 citation omitted).

3 **B. Analysis**

4 “In actions seeking declaratory or injunctive relief, it is well established that the
5 amount in controversy is measured by the value of the object of the litigation.” *Hunt v.*
6 *Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 347 (1977); *see also Cohn v.*
7 *Petsmart*, 281 F. 3d 837, 840 (9th Cir. 2002). The parties agree that the Property is
8 valued at more than \$75,000 and do not dispute that the amount in controversy
9 requirement is met.

10 The jurisdictional dispute instead concerns the diversity between parties.
11 OneWest has its principle place of business in California and CRC has its principle place
12 of business in Nevada. In its Petition for Removal, however, OneWest argued that this
13 Court should ignore CRC’s presence in determining diversity because Plaintiff
14 fraudulently joined CRC. (See dkt. no. 1 at 2.)

15 In his Petition for Remand, Plaintiff argues that the claims against CRC are valid
16 because CRC is the Trustee under the Deed of Trust and “presumably [has] the power
17 to sell the Property in foreclosure.” (See dkt. no. 6 at 4.) Defendants argue in their
18 Opposition that Plaintiff has failed to state a single claim against CRC and thus CRC’s
19 joinder was fraudulent. (See dkt. no. 12 at 3.) CRC, as the duly substituted Trustee, had
20 no involvement in the formation of the reverse mortgage that is the subject of the suit.
21 CRC did not become the Trustee until July 23, 2013, five years after the Freeneys
22 entered into the reverse mortgage. (See *id.* at 4.) As a result, Plaintiff’s claims of
23 rescission and deceptive trade practices, as well as Plaintiff’s derivative relief, are not
24 based on CRC’s conduct.

25 In his Reply, Plaintiff, seemingly recognizing that he has failed to allege a claim
26 against CRC, requests leave of Court to amend his Complaint to assert a quiet title
27 claim. It is inappropriate for Plaintiff to seek to amend his complaint in the Reply to his
28 Motion for Remand. However, even if the Court were to allow Plaintiff to amend upon a

1 properly filed motion to amend, Plaintiff would still need to demonstrate that the addition
2 of a quiet title claim would remedy the fraudulent joinder. "Typically, a trustee's duties
3 are confined to the duties imposed by governing foreclosure statutes and the deed of
4 trust itself." *Harlow v. MTC Fin. Inc.*, 865 F. Supp. 2d 1095, 1100 (D. Nev. 2012).
5 Plaintiff's Amended Complaint alleges no facts indicating that CRC violated either a
6 foreclosure statute or the Deed of Trust. The Court therefore finds that CRC is a
7 fraudulently joined party and shall not be considered for the purposes of jurisdiction.

8 Given that the parties are diverse and the amount in controversy requirement is
9 met, the Court will exercise jurisdiction over this dispute.

10 **IV. CONCLUSION**

11 It is hereby ordered that Plaintiff's Motion to Remand (dkt. no. 6) is denied.

12 DATED THIS 22nd day of April 2014.

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15 MIRANDA M. DU
16 UNITED STATES DISTRICT JUDGE
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